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No. 79-783

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILBURN E. PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 602 F. 2d 1215.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1979. A petition for rehearing was denied on October 22, 1979, and the petition for a writ of certiorari was filed on November 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's "check kiting" scheme constituted an offense under 18 U.S.C. 1014.

STATUTE INVOLVED

18 U.S.C. 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any * * * property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any * * * advance * * * or loan * * * or extension of any of the same * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

On September 27, 1978, petitioner was indicted in the United States District Court for the Middle District of Georgia on eight counts of willfully making false statements and overvaluing various securities in order to obtain credit from federally-insured banks, in violation of 18 U.S.C. 1014, and one count of conspiring to violate Section 1014, in violation of 18 U.S.C. 371.[1] Prior to trial, petitioner moved to dismiss the indictment on the grounds that the allegations of the indictment did not state a crime under Section 1014. At a hearing on this motion, the government made a proffer (described in detail below) which showed that petitioner and co-conspirator Booker T. Fountain had operated their respective used car businesses by means of a complicated check kiting scheme (Pet. App. 2a). The district court nonetheless granted petitioner's motion and dismissed the indictment. On the government's appeal, the court of appeals reversed (*id.* at 1a-9a), concluding that

[1]As part of the conspiracy, petitioner was also alleged to have caused the making of false entries in the banks' records, in violation of 18 U.S.C. 1005.

petitioner's "check kiting * * * was a device for fraudulently obtaining credit sufficiently in the nature of an advance or loan to come within the scope of 18 U.S.C. §1014" (*id.* at 7a).

The evidence adduced at the pretrial hearing showed that in September 1977 Fountain's bank informed him that it would no longer advance his two used car dealerships immediate credit on sight drafts but that it would continue to give such credit for checks deposited with the bank. Fountain, who knew that petitioner was also hard pressed for credit, thereafter enlisted petitioner in a fraudulent scheme to obtain credit. The two agreed that Fountain would sell fictitious automobiles to petitioner's business (South Georgia Auto Aunction, Inc.) and that petitioner would then sell the same nonexistent automobiles to Fountain's other dealership. As part of these phantom transactions, Fountain, as buyer, would issue worthless checks to petitioner's company, which in turn would also issue worthless checks to Fountain as seller, after deducting a $40 auction fee per automobile. Fountain and petitioner would then deposit each other's worthless checks[2] in their own accounts and thereby obtain credit to operate their businesses. When a state bank examiner discovered the "check kite" in January 1978, Fountain's bank was left with $178,000 in worthless checks (Pet. App. 2a-3a).

ARGUMENT

Petitioner contends (Pet. 5-11) that his check kiting scheme did not violate 18 U.S.C. 1014 and that therefore the court of appeals erred in reinstating his indictment. At the outset, however, we note that there is no need for

[2]In some instances, petitioner gave Fountain checks drawn on the auction company's account at a time when that account was overdrawn by up to $100,000 (Pet. App. 3a).

the Court to consider petitioner's claim at this time. The ruling below places petitioner in the exact position he would have occupied if the district court had denied his motion to dismiss, and such an interlocutory order is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222-224 (1929). The same considerations that militate against interlocutory appeal of a motion to dismiss also counsel against interlocutory review by this Court. If petitioner is acquitted at his trial—a proceeding that has already been delayed by more than one year—his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all of his contentions to this Court by seeking review of the final judgment. In short, petitioner's claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

In any event, the court of appeals properly construed Section 1014. The government's proffer of evidence showed that petitioner purposefully issued and deposited worthless checks, knowing that various banks would extend credit to his company and his co-conspirator based on the purported value of those securities (Pet. App. 3a-4a). In other words, petitioner willfully "ma[d]e * * * false statement[s and] overvalue[d] * * * securit[ies], for the purpose of influencing * * * the action of * * * bank[s] the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any * * * advance * * * or loan * * *." 18 U.S.C. 1014. No court of appeals has adopted a contrary construction of Section 1014, and further review of this question is unwarranted.

Petitioner nonetheless argues (Pet. 6-9) that the issuance of a series of worthless checks as the basis for obtaining credit does not constitute the overvaluation of a security within the meaning of Section 1014. But Congress has elsewhere specifically defined "security" to include a check (18 U.S.C. 2311), and there is no reason to construe Section 1014 more narrowly. Moreover, there is no doubt that petitioner knowingly overvalued those worthless securities in obtaining credit. As the court of appeals explained (Pet. App. 5a):

> If payment of the check depends on the deposit of the check of another, the necessary implication is that the other's check will be paid from an account having funds at least equivalent to the face amount of the check. We consider that the necessary implications which a check carries, and of which [petitioner was] fully aware, are the legal equivalent of a representation or statement as to the value of the checks. Here, we are not dealing with a man careless in balancing his check book. We have here two business men who contrived a kiting scheme that would have the effect of giving them *credit* or a *loan* or an *advance* on their false representation of the value of their checks.[3]

Petitioner also erroneously asserts (Pet. 9-11) that Section 1014 is limited solely to fraud in connection with farm and home loans. To be sure, as originally enacted, Section 1014 was a compilation of 13 earlier laws primarily concerning misrepresentations to government agencies with regard to farm and home loans. See Act of June 25, 1948, ch. 645, 62 Stat. 752; *United States* v.

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[3]Likewise, petitioner's use of worthless checks constituted a false statement in violation of Section 1014. Petitioner's further claim (Pet. 8-9) that the checks were not worthless is a question of fact to be determined at trial.

Sabatino, 485 F. 2d 540, 543 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974). Even the original version of Section 1014, however, covered at least two federal agencies that issued loans unrelated to farm or home construction. See Pet. App. 8a (Federal Reserve Bank and Reconstruction Finance Corporation). Furthermore, in 1970 Congress expanded the scope of Section 1014 to include banks and similar institutions insured by either the FDIC or the FSLIC. It is thus beyond dispute that Section 1014 is not restricted to home and farm loans, but rather covers "all undertakings which might subject the FDIC insure bank to risk of loss." *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (10th Cir. 1978); see *United States* v. *Sabatino*, *supra* (auto loans).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BROWN
Attorney

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[4]Petitioner's contention (Pet. 11-14) that Section 1014 is unconstitutionally vague is without merit. See, *e.g.*, *United States* v. *Stoddart*, *supra*, 574 F. 2d at 1053; *United States* v. *Sabatino*, *supra*, 485 F. 2d at 542. See also *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). The statute broadly proscribes the use of misrepresentations and overvalued securities to obtain credit -- precisely the offense that is alleged to have occured here.